IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4311 of 1997

with

SPECIAL CIVIL APPLICATION No 3321 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JANAKBHAI RANABHAI RAHTOD

Versus

PROJECT OFFICER

Appearance:

1. Special Civil Application No. 4311 of 1997
MS K.C. THAKKAR for MR YOGESH S LAKHANI
for Petitioner No. 1
MR HASIT DILIP DAVE for Respondent No. 1

2. Special Civil Application No. 3321 of 1997
MS KC THAKKAR for MR YOGESH S LAKHANI
for Petitioner No. 1
MR CHUDGAR for NANAVATI ASSOCIATES for Respondent

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 16/01/2004

ORAL JUDGEMENT

Both these petitions are directed against the award made by the Presiding Officer, Labour Court, Rajkot dated 15th January, 1997 and hence they are heard together and they are now being disposed of by this common judgment.

1.1. Special Civil Application No. 4311 of 1997 has been filed by the original workman challenging that part of the award whereby, he has been denied 80% of the backwages, though the order of reinstatement with 20% backwages has been passed in his favour.

1.2. Special Civil Application No.3321 of 1997 is filed by the Gujarat State Forest Development Corporation (hereinafter referred to as "the Corporation") i.e. the employer of the concerned workman, challenging the award to the extent that it directs the Corporation to reinstate the workman and to pay him 20% backwages with continuity of service.

2. The workman was employed as Clerk-cum-Accountant with the Corporation. It is not in dispute that the said appointment was for a period of 29 days. On expiry of the said period, the workman was issued the appointment orders for a limited period, till his service was terminated on 2nd July, 1988. In other words, the workman was continued in the employment of the Corporation for three years and two months with intermittent artificial breaks in the service.

2.1. It is the say of the workman that on 2nd July, 1988 by oral intimation, his service was terminated by the Corporation and his repeated attempts to resume duties were foiled. He was, therefore, constrained to serve a notice dated 28th June, 1989 calling upon the Corporation to take him back in the service, but the said notice was never replied to. Ultimately, the dispute was referred to Assistant Labour Commissioner, Rajkot for conciliation, but it filed and hence Reference under the provision of Industrial Disputes Act, 1947 (hereinafter referred to as "the I.D. Act"), was made. Before the Labour Court prayer for reinstatement with backwages and incidental benefit was made. The said Reference was made in the Labour Court at Rajkot and numbered as Reference (L.C.R.) No.1519 of 1989.

2.2. In the said Reference, it was averred by the

workman that he was appointed on the post of Typist-clerk - cum - Accountant on the monthly salary of Rs.1,300=00 and he discharged his duties faithfully and with all sincerity. However, the Corporation without any plausible reasons and without following the requisite procedure under the law, terminated his service with effect from 2nd July, 1988. His say was that since the termination of service was against law and in violation of the I.D. Act, the Corporation be directed to reinstate him in the service with all incidental benefits.

2.3. The said claim was contested by the Corporation by filing reply at Exh.10. It was contended that the relief claimed by the workman in the Reference was not required to be granted because, the Reference itself was not maintainable inasmuch as, previously the workman had filed a Civil Suit for same relief and that was withdrawn and now the Reference has been filed. It was further contended that it was not true, that he was working on the post of Typist-clerk - cum - Accountant since 1st May, 1985 on the monthly salary of Rs.1,300=00. It was admitted that after relieving the workman, no person was appointed on his post. It was also contended that the workman was following the profession of lawyer and he was gainfully employed elsewhere. It was further contended that the workman was appointed purely on temporary basis and despite the fact that he did not possess requisite qualification, he was appointed by way of stop-gap arrangement i.e. till the suitable candidate for the said post was found. It was further contended that even requisite procedure of holding interview etc., had not been followed before giving appointment to the workman. He has lastly contended that since he was purely on temporary post, it was not all incumbent on the Corporation to follow the procedure under 25-F of the I.D. Act. and, therefore, this reference was required to be dismissed.

3. Before the Labour Court, both the parties adduced evidence to substantiate their case before it. It appears that from the record that the workman by and large struck to his version to the fact that he was employed on the said post with effect from 1st May, 1985 and that on 2nd July, 1988, his service was terminated orally without following the requisite procedure by the Corporation.

3.1. The Corporation also examined witnesses on its behalf whose evidence has been adequately dealt with by the Labour Court in its judgment. At the end of the

proceedings, the Labour Court came to the conclusion that the workman had rendered service for more than 240 days in each year and, therefore, the Corporation was required to follow the procedure as envisaged under Section 25-F the I.D. Act, but the same has not been followed and, therefore, termination order was bad in law. So far as the award of backwages is concerned, the Labour Court held that there was some substance in the say of the Corporation, that the workman was gainfully employed elsewhere as he was having Sanad to follow his legal profession and, thereby he had a source of income. It, therefore, awarded 20% backwages against the claim of 100%. In these circumstances, both these petitions have been filed before this Court.

4. Ms.K.C. Thakkar learned advocate appearing for the petitioner has submitted that the Labour Court without there being any evidence has erroneously come to the conclusion that the workman was gainfully employed and it has wrongly denied 80% backwages. She has further submitted that even though the workman was holding Sanad he was not actively practising. On the contrary letter of Gujarat Bar Council has been produced on the record to show that the said Sanad was deposited in the month of February, 1991 before it. She therefore, submitted that this is a fit case where full backwages ought to have been awarded by the Labour Court.

4.1. Mr.Chudgar learned advocate appearing for the respondent - Corporation has submitted that the award to the extent that it orders reinstatement with 20% backwages is per se illegal and against the evidence on record. His first contention is that the say of the workman that his service was orally terminated is not true. In fact it was he who had voluntarily abandoned the employment and thereafter had not shown any willingness to join it. He has further submitted that assuming that his service was terminated, then also the procedure under 25-F of the I.D. Act was not required to be followed because the workman was appointed purely on temporary basis, as stop-gap arrangement because regular candidate on the post of Typist-clerk cum - Accountant was not available. He has further submitted that there is no dispute that the appointments were being given for 29 days only and the Corporation was entitled to terminate it any time without following the requisite procedure. He has also submitted that the workman had not come to the Court with clean hands and he had filed false affidavit before the Labour Court to the effect that he was not gainfully employed, whereas he was holding Sanad and was practising in the Court. Lastly,

he has submitted that the petition of the workman does not have any merit and it is required to be dismissed and the petition of the Corporation is required to be allowed.

5. Having gone through the record of this petition, and also having carefully considered the rival submissions, it is clear that the workman was appointed on the post of Typist-clerk - cum - Accountant on 1st May, 1985 and, thereafter, he was continued in the employment till 2nd July, 1988. It also appears that during all these three years, he was at regular intervals given fresh appointment orders since each order was for 29 days only. The say of the workman is that he was discharging duty all throughout at monthly salary of Rs.1,300=00. The Labour Court upon appreciation of the evidence has found that the workman had rendered service for more than 240 days in each year. Now the question remains that whether this was purely as stop-gap arrangement or it was a continuous employment for little over three years, by giving artificial breaks. In that behalf it is interesting to turn to the evidence of the Corporation's witnesses namely (i) Deepakbhai Tipra whose evidence is discussed by the Labour Court extensively in its judgment in paragraph 10. He has stated that the workman had rendered service as Typist-clerk - cum Accountant from 1st May, 1985 to 2nd July, 1988 and, thereafter he was relieved from the service in accordance with the direction of the head Office. He has further stated that the workman was appointed to work as accountant, as there was no typing machine available in the office. He has also stated that the post on which the appointment was made i.e. of the accountant and clerk, it was a permanent post. He has also stated that even during the period of break between his two appointments, the workman was required to work in the office and when he was relieved from the service, he was discharging his duty as Accountant-Clerk. He has also stated that request made by the workman to take him back in the service, was not accepted by the Corporation.

5.1. This clearly gives go-by to the case of the Corporation that the workman on his own volition had abandoned the employment and had never shown his willingness to resume it. Not only that, but his evidence amply proves that the so call break between the two appointments were merely artificial breaks as even during the period between the two appointment orders, work was being taken from him by the Corporation. It is not in dispute that no written order was given to the workman relieving him from the service and it is also an

admitted fact that no procedure under 25-F was followed.

5.2. The question that remains to be decided is whether the Corporation in view of the nature of the appointment of the workman is entitled to terminate his service without following the requisite procedure as laid down under Section 25-F of the I.D. Act. Mr. Chudgar submits that since it was purely temporary appointment, the procedure was not required to be followed. However, it is very clear from the aforesaid evidence of the Corporation's own witness that in the guise of the appointment orders for temporary period, the workman was required to render service continuously without any break, and that to for a period of over three years. If that be so, then the Corporation was under the obligation to resort to the procedure under Section 25-F of the I.D. Act before terminating the service of the workman. But that has not been done so. Then obviously, for that reason the order of termination is bad in law.

5.3. Mr.Chudgar has further placed reliance on the decision of the Apex Court rendered in the case of Madhyamik Siksha Parisad, Uttar Pradesh v. Anilkumar Mishra & Ors., reported in 1994 (Vol.I) L.L.N 851. In that case the concerned employees were employed to clear the backlog of issuing certificates on payment ad-quantum and were continued to to engaged in that manner for one year or two years and, thereafter the assignment was discontinued. The assignment was purely on ad-hoc basis and had continued till there was need to have such employees to clear the backlog of issuing the certificates. In these circumstances, the Apex Court has said that there was no need to resort to 25-F of the I.D. Act and the completion of 240 days did not come to the help of such employees. However, in the present case, the facts are totally different. Not only that but the letters of appointments which indicated that it was a temporary appointment, till such time, suitable candidate was found for the said post were not produced in evidence. There is no evidence on record to show that it was on ad-hoc basis. Further, in the present case, workman was appointed and made to work continuously on the permanent post for more than three years and, therefore, in my opinion, he would clearly stand covered under the definition of "Workman" and the provision of Section 25-F has to be resorted before passing the order of termination. Similarly, he has placed reliance on the decision of the Apex Court rendered in the case of Surendra Kumar Gyani v. State of Rajasthan reported in A.I.R. 1993 S.C. 115. The facts of that case will not apply to the present case. In that case the appointments

for temporary period were made against the relevant Recruitment Rules. In the instant case, the Corporation has not produced any evidence to show that the Recruitment Rules of the Corporation did not permit such appointment to be made. Yet another case has been cited by Mr.Chudgar wherein the Apex Court has laid down that in certain cases, 25-F is not required to be followed, as termination would amount to retrenchment. In that case, the facts were that the concerned employee was appointed for a period of three months or till the regularly selected candidate resumed the office. He was appointed in January, 1988 and his service was terminated on November, 1988. In these circumstances, the Apex Court said that since the appointment was made upon a specific understanding that till the suitable candidate was available, the concerned employee would remain in service and when that exigency was over, his service was terminated, there was no need to follow section 25(F) of I.D. Act. This decision has been rendered in the case of State of Rajasthan v. Rameshwar Lal Gahlot reported in 1996 Labour Industrial Court at page 914. Again this decision will not render any help to Mr.Chudgar because as already stated above, the Corporation has failed to produce on record that the appointment was purely on temporary basis and that too till the regular candidate for the said post was available and that it was made clear in that order that upon availability of such candidate the service of the workman would be terminated. Since, these evidence is wanting in this case, the aforesaid decision will not apply. Even otherwise, also considering the facts which have been stated above, the case of the workman squarely falls within the ambit of the I.D. Act and the termination amounts to retrenchment and it is to be done in accordance with the provisions of Section 25-F of the I.D. Act.

6. As against that, Ms. Thakkar has placed reliance on the decision rendered by the learned Single Judge (Coram : Miss R.M. Doshit, J.) of this Court in case of Gujarat State Forest Development Corporation v. Hasmukh Keshavji Parmar C/o. Babulal M Mavani - Advocate in S.C.A. 13536 of 2003 dated 3rd October, 2003. In the similar circumstances, the learned Single Judge has held that merely by issuing order for 29 days, the appointment does not become ad-hoc and has held that the appointment was in the vacancy of regular post. In that view of the matter, the findings given by the Labour Court on this count is just, proper and does not call for any interference by this Court. Since the Labour Court has found that the termination of the service of the workman was illegal, it has directed reinstatement and for the

reasons stated above, the said order appears to be just and proper.

7. The next question that is required to be decided is whether the grant of 20% backwages by the Labour Court is justified in the facts of this case. This aspect has been considered by the Labour Court in its para 15 of its judgment. It was contended before the Labour Court by the Corporation that the workman had suppressed the material fact inasmuch as that he did not possess Sanad to practice in the Court of law and he was earning substantial income and, therefore, he was gainfully employed. It was further submitted that the workman had deliberately stated incorrect facts on affidavit that he was not gainfully employed. The Labour Court has thereafter held that in view of the submission made on behalf of the Corporation, its say was required to be accepted and it was required to be held that the workman was gainfully employed elsewhere and, therefore, while awarding the backwages, it directed that 20% backwages should be awarded to him.

8. This approach of the Labour Court is erroneous. The Presiding Officer has merely accepted the submissions made on behalf of the Corporation without taking any trouble to find out whether there was reliable evidence to substantiate the said submission. If the Corporation wanted to contend that the workman was gainfully employed, it should have collected relevant evidence and produced before it. This could have been done by producing the details regarding the cases in which the workman had appeared after his service was terminated and before he filed Reference in the Labour Court. Such evidence was easily available as it formed part of the Court record. The Corporation has chosen not to do so. As against that the workman has produced on record letter dated 16th February, 1991 which has been addressed to him by the Secretary, Bar Council of Gujarat which is produced on record at Exh.42. That document shows that vide Resolution no.2/91, passed in the meeting of the Bar Council dated 9th February, 1991, the workman's Sanad was kept in deposit, meaning thereby, he must have surrendered it to the Bar Council, atleast sometime prior to his date of resolution. It is not the case of the Corporation that the workman possessed Sanad even at the time when he was in its employment. Therefore, obviously, sometime must have elapsed before he obtained Sanad after termination. It is a matter of common knowledge that by and large lawyer does not start earning immediately upon receipt of Sanad. In these circumstances, conclusion drawn by the Labour Court is

absolutely erroneous. However, the fact cannot be overlooked that after termination of his service, the petitioner might have generated some income so as to maintain himself as no one can remain without means of livelihood. In these circumstances, the award of the Labour Court in relation to the award of the backwages is required to be modified and instead of 20% backwages, it is to be increased to 75% backwages.

9. In the result, the petition of the workman i.e. Special Civil Application No. 4311 of 1997 is partly allowed and 20% backwages awarded by the Labour Court is increased to 75%. Rule is made absolute to the aforesaid extent.

So far the Special Civil Application No. 3321 of 1997 is concerned, it is dismissed with no order as to costs. Rule is discharged. Interim relief granted earlier stands vacated.

[AKSHAY H. MEHTA, J.]

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